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Emerging Jurisdictional Doctrines of the Burger Court: A Doctrine of Convenience

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EMERGING JURISDICTIONAL DOCTRINES OF THE BURGER COURT: A DOCTRINE OF CONVENIENCE

As originally conceived by the Framers of the Constitution, the judiciary was intended to be the only branch of the federal government physically unable to enforce its own rulings.[1] Thus arose the characterization of the judiciary as the weakest branch of government.[2] Due to the need for impartial federal judges, this structure was deemed necessary because the federal judiciary is the only branch of government that is inherently undemocratic.[3] Recognizing that the dependence of the judiciary on the coordinate branches for enforcement of its decisions places it in a uniquely sensitive position in the scheme of the federal government, the Supreme Court consistently has sought to maximize the power of the judicial branch through two basic, distinct jurisdictional devices.[4] One approach seeks to maximize federal judicial power through an expansive reading of article III of the Constitution,[5] thus extending the original and appellate jurisdiction of the courts to hear cases that may only tangentially "arise under" article III, but that never-

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[1] *See* THE FEDERALIST No. 78, at 490 (A. Hamilton) (B. Wright ed. 1961). "The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." *Id.*; *see also* 1 C. MONTESQUIEU, THE SPIRIT OF THE LAWS 178 (T. Nugent trans. 1873).

[2] *See* R. HODDER-WILLIAMS, THE POLITICS OF THE U.S. SUPREME COURT 109 (1980); *see also* M. WENDELL, BETWEEN THE FEDERAL AND STATE COURTS 26 (1949) (since Court does not have power to enforce its decisions, others must be relied upon to legitimate its mandates).

[3] *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 552 (1946) (Court cannot entertain cases that are political in nature); *see* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 623 (1981).

[4] *See infra* notes 5 & 6 and accompanying text.

[5] U.S. CONST. art. III, § 2. Article III, § 2 provides, in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; . . .
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> . . . In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Id. Congress has specifically provided for Supreme Court appellate jurisdiction of state court decisions addressing federal questions. *See* 28 U.S.C. § 1257 (1982); *see also infra* note 133 (discussing construction of § 1257).

theless involve important federal policies or interests.[6] The other approach, used more frequently today, attempts to increase judicial power through the imposition of prudential judge-made limitations upon congressionally created jurisdictional statutes.[7] By refusing to hear cases that technically are within the jurisdiction of the federal courts but that do not invoke significant federal interests, the dilution of judicial power is minimized through judicial restraint, and the legitimacy of the judicial branch is preserved.[8] In recent years, however, the Burger Court has rendered inconsistent jurisdictional decisions in habeas corpus[9] and adequate and independent state grounds[10] cases, thereby undermining the foundation upon which broad federal jurisdiction is based.[11]

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[6] To establish legitimacy, the early Supreme Court broadly defined its powers under the Constitution and the first Judiciary Act. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 820-23 (1824) (power of judiciary is necessarily co-extensive with power of legislative branch); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 342-43 (1816) (federal appellate jurisdiction not limited to cases containing federal questions that arise in federal courts); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (establishing Supreme Court power of judicial review). Specifically, Chief Justice Marshall contended that federal jurisdiction could exist whenever a federal interest was at stake. *See Osborn*, 22 U.S. (9 Wheat.) at 823. Chief Justice Marshall's theory of federal jurisdiction is broad because it requires only the potential of a federal issue to justify jurisdiction. *See id.* at 824; *see also* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 54-59 (1980) (discussion of various interpretations of *Osborn*).

[7] *See, e.g.*, Younger v. Harris, 401 U.S. 37, 53 (1971) (federal court will not enjoin a pending state criminal prosecution absent extraordinary circumstances); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672 (1950) (to "arise under" the Constitution, federal question must be affirmatively established in complaint); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941) (Court will not hear federal constitutional issue when difficult question of state law remains unresolved).

[8] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 481-84 (1957) (Frankfurter, J., dissenting).

[9] *See infra* notes 62-72 and accompanying text. Until recently, the Supreme Court had fostered easy access to claimants pursuing a federal forum when Congress had provided for one, and when an issue of federal law was in question. *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 242-43 (1972) (federal court in § 1983 action can grant injunction to stay proceeding pending in state court); Fay v. Noia, 372 U.S. 391, 424 (1963) (habeas petitioner not denied federal forum unless he deliberately waived state procedural rule).

[10] *See infra* notes 12-15 and accompanying text. The Court generally has denied access to a federal forum when a state decision may be based on an adequate state ground and involves only an inchoate federal issue. *See, e.g.*, Murdock v. Memphis, 87 (22 Wall.) 590, 636 (1874) (adequate and independent state ground doctrine).

[11] *See infra* notes 131-144 and accompanying text. Both habeas corpus jurisdiction and the adequate and independent state ground doctrine reflect the Court's interest in ensuring that the federal Constitution has been at least minimally upheld without losing sight of the goal of maintaining federal-state comity. *See* Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 297 (1977) (Supreme Court decisions represent minimum protection of constitutionally guaranteed rights); *see*

This Note will address these two areas in which the Burger Court has instituted unprecedented jurisdictional policies. First, in discussing the adequate and independent state ground doctrine, the Note will focus on recent precedent that permits Supreme Court review whenever the grounds of a state case are not clearly based in state law. Second, the Court's recent trend of constricting federal habeas relief for state prisoners, in spite of the legislative directive for broad federal collateral review, will be examined. The Note will concentrate on the Court's unprecedented inclination toward upholding state procedural requirements regardless of the substantive merits of the claim being considered. Finally, the Burger Court's policies in these areas will be assessed in light of the theories underlying federal jurisdiction and this Note will conclude that a more prudential policy is essential to maintain the legitimacy of the Court as an institution.

THE ADEQUATE AND INDEPENDENT STATE GROUND DOCTRINE

Until recently, in deciding whether to review a state case when it is unclear if the state court has rendered its decision primarily on state or federal constitutional grounds, the Supreme Court had either dismissed the case for lack of jurisdiction,[12] granted a continuance to obtain clarification from the state court,[13] or, most frequently, vacated the decision and remanded it to the state.[14] In the

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also Brown v. Allen, 344 U.S. 443, 508 (1953) (separate opinion of Justice Frankfurter) (habeas relief must be broad to ensure constitutionality of incarceration); Herb v. Pitcairn, 324 U.S. 117, 128 (1945) (adequate and independent state ground doctrine protects state courts from "unwitting interference").

[12] *See, e.g.*, Lynch v. New York, 293 U.S. 52, 54-55 (1934) (federal ground must appear affirmatively on record to establish Supreme Court jurisdiction in ambiguously grounded state cases).

[13] *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 128 (1945) (continuance granted to allow petitioner to obtain clarification from state court as to state ground of decision). The Court advocated continuance and clarification as the easiest means of assuring deference to state courts without renouncing federal review when it is proper. *See id.*; *see also* Orr v. Orr, 440 U.S. 268, 276 (1979) (dictum) (Court could remand for clarification if ambiguity existed); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 583 (1977) (Stevens, J., dissenting) (case should be remanded to Ohio court for clarification of basis of decision). Under the continuance method, the state court judgment remains intact and the burden of sustaining review remains with the petitioner. *See* Comment, Michigan v. Long: *Presumptive Federal Appellate Jurisdiction over State Cases Containing Ambiguous Grounds of Decision*, 69 IOWA L. REV. 1081, 1089 (1984).

[14] *See, e.g.*, Minnesota v. National Tea Co., 309 U.S. 551, 556 (1940). In *National Tea*, the Supreme Court of Minnesota had determined that the graduated tax law of Minnesota violated both the state and federal constitutions. *Id.* at 552. The Supreme Court of the

past, considerations of comity and judicial restraint have caused the Court to exercise its prudential power to constrict the boundaries of federal jurisdiction created by Congress when federal interests would not otherwise be furthered.[15] Since neither the Constitution nor Congress has authorized Supreme Court jurisdiction over state cases presenting only the mere possibility of a federal issue,[16] it is arguable that the traditional policy of denying review

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United States would not review the case on the merits because there was "considerable uncertainty as to the precise grounds for the decision." *Id.* at 555-56. The Court reasoned that state courts should be free to review cases arising under the United States Constitution. *Id.* at 557. To achieve this jurisdictional balance, the Court vacated and remanded the case to the state court. *Id.* The vacation method is expansive because, by shifting the burden of sustaining review onto the state court, the petitioner does not automatically lose. *See* Comment, *supra* note 13, at 1088-89. The policy of vacating and remanding ambiguously grounded state cases has been repeatedly followed by the Court. *See, e.g.*, Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241, 241-42 (1978) (per curiam) (remanded to determine if decision of state court based on federal constitutional claims or on adequate and independent state grounds); Department of Motor Vehicles v. Rios, 410 U.S. 425, 426 (1973) (per curiam) (remanded to determine basis of decision of state court); Dixon v. Duffy, 344 U.S. 143, 146 (1952) (remanded to see if decision of state court based on adequate and independent state grounds or on federal constitutional claims).

[15] *See* Herb v. Pitcairn, 324 U.S. 117, 125 (1945); Minnesota v. National Tea Co., 309 U.S. 551, 555, 557 (1940); Comment, *supra* note 13, at 1087; *see also* Berkemer v. McCarty, 104 S. Ct. 3138, 3154 (1984) (Stevens, J., concurring in part) (Court should follow policy of judicial restraint no matter how appealing constitutional issue may be). The adequate and independent state ground doctrine may be viewed merely as a doctrine of judicial restraint because § 1257 of Title 28 technically provides the Supreme Court with the power to review state law cases when questions of federal constitutional law are at issue. *See* 28 U.S.C. § 1257(3) (1982). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 95 (2d ed. 1983) (state decision resting on an adequate non-federal ground is a concrete controversy rendering the federal decision moot rather than advisory). *But cf.* Vitiello, *Independent and Adequate State Grounds: A Stone Unturned by Louisiana's Criminal Defense Bar?* 25 LOY. L. REV. 745, 753 (1979) (if Court reviews only federal question in an adequate and independent state ground case, it would be rendering an advisory opinion). This view is consistent with the principle that a federal court can review any case or controversy arising under article III that involves a federal ingredient. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824); *infra* note 117 and accompanying text. However, the Court has stated that Congress would have affirmatively granted the federal courts jurisdiction over cases with adequate and independent state grounds if Congress intended for the federal courts to have such power. *See* Murdock v. Memphis, 87 (22 Wall.) 590, 619 (1874). Furthermore, when the ambiguity results from a potential misconstruction of the federal Constitution as overly broad, the state case is not within the purview of § 1257(3), which permits Supreme Court review only when an actual federal issue exists. *See* 28 U.S.C. § 1257(3) (1982) (certiorari may be granted when "any title, right, privilege or immunity is specially set up or claimed under the Constitution"); *infra* note 133.

[16] *See* U.S. CONST. art. III; *supra* note 5 and accompanying text. Supreme Court jurisdiction is based solely on a specific grant of authority under article III or a Congressional grant of jurisdiction pursuant to article III. *See* U.S. CONST. art. III. Ambiguously grounded state cases involving only the potential of a misunderstanding of federal law fall neither within the enumerated grants of jurisdiction under article III nor within the broader "aris-

of ambiguously grounded state decisions when no federal right has been denied was a recognition by the Court of a lack of any authority to review such decisions.[17] Moreover, if the Court reviews a state case that, upon clarification, could reveal an adequate nonfederal ground of decision, and the state court on remand asserts that the decision rests solely on the state constitution, the state court could reverse the outcome of the Supreme Court and render the decision of the latter a mere advisory opinion.[18] The adequate and independent state ground doctrine, as historically applied, shielded the Court from rendering advisory opinions by requiring concrete federal grounds for decision prior to invoking federal judicial power.[19]

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ing under" language. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672-73 (1950) (matter in controversy must actually arise under Constitution to establish jurisdiction of federal courts); Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908) (plaintiff's cause of action, not an anticipated defense, must arise under Constitution); U.S. CONST. art. III, § 2. Further, by restricting certiorari review of state cases to actual claims under the federal Constitution, Congress implicitly has refused to extend Supreme Court jurisdiction to state cases that involve only the possibility of a misconstruction of a federal constitutional provision as overly broad. *See* 28 U.S.C. § 1257(3) (1982); *infra* note 133.

[17] *See, e.g.*, Dixon v. Duffy, 344 U.S. 143, 146 (1952) (Court has no jurisdiction to review federal question if state judgment based on adequate state ground); Herb v. Pitcairn, 324 U.S. 117, 128 (1945) (Court will not review state decision unless clear that it was not decided on adequate and independent state ground); Lynch v. New York, 293 U.S. 52, 54 (1934) (fact that federal question was necessary to decision of state court essential to jurisdiction of Supreme Court). In *Lynch*, for example, the Court said that although the state court's decision could be construed as resting on federal law, "jurisdiction cannot be founded upon surmise." 293 U.S at 54. To establish federal jurisdiction, the federal ground must appear affirmatively from the record. *Id.* The burden of proving that an adequate and independent state ground did not exist is on the party trying to establish jurisdiction. *See* Durley v. Mayo, 351 U.S. 277, 281 (1955) (Court must take "scrupulous care" that case below was based on federal law).

[18] *See, e.g.*, State v. Neville, 346 N.W.2d 425, 427 (S.D. 1984) (on remand, Supreme Court determination not controlling on state court decision); *see* Herb v. Pitcairn, 324 U.S. 117, 126 (1945). As the ultimate authority on state law, a state court, on remand, can either enter judgment or reinstate its prior opinion as controlling. R. HODDER-WILLIAMS, *supra* note 2, at 110-12; *see* Orr v. Orr, 440 U.S. 268, 283 (1979). In South Dakota v. Neville, 459 U.S. 553 (1983), the Supreme Court reversed the decision of a South Dakota court to suppress evidence of the refusal of a defendant to submit to a blood alcohol test. *Id.* at 566. The Supreme Court remanded the case to the South Dakota Supreme Court for further proceedings not inconsistent with the Supreme Court's opinion. *Id.* On remand, the Supreme Court of South Dakota implicitly overruled the United States Supreme Court by basing its decision on state constitutional privileges. State v. Neville, 346 N.W.2d at 431. The South Dakota Court emphasized that the opinion of the Supreme Court was not controlling. *Id.* at 427-28.

[19] *See* Herb v. Pitcairn, 324 U.S. 117, 128 (1945). The Court has noted that its policy to enforce the adequate and independent state ground doctrine "seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told

In *Michigan v. Long*,[20] however, the Supreme Court recently reformulated the adequate and independent state ground doctrine, holding that unless an adequate nonfederal ground affirmatively appears from the face of the record, an ambiguous state decision can be reviewed on the merits without state clarification on remand.[21] Under *Long*, even if no federal right has been denied, the Supreme Court may exercise appellate jurisdiction provided that the state court potentially may have founded its decision on a misapplication of federal law.[22] The *Long* Court criticized vacation and continuance as inefficient and prone to cause delay, while rejecting dismissal as antithetical to the goal of uniformity of federal law.[23] To remedy these defects, the Court determined that any ambiguity concerning whether a case could have been decided on an independent state ground may be resolved as if the state had relied

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what they have intended." *Id.* This policy protects the state courts from "unwitting interference," and, at the same time, protects the Supreme Court from "unwitting renunciation." *Id.* Similarly, in Minnesota v. National Tea Co., 309 U.S. 551 (1940), the Court stated that important federal issues should be adjudicated by the Court without encroaching on state constitutional law. *See id.* at 557.

[20] 103 S. Ct. 3469 (1983).

[21] *See id.* at 3477-78. In an opinion by Justice O'Connor, the *Long* Court determined that the prior methods of deciding whether a case had an adequate nonfederal ground were ad hoc and inconsistent. *See id.* at 3475. The Court stated: "[w]e merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Id.* at 3476-77. As Justice O'Connor mentioned in a footnote, this new presumption was foreshadowed in two recent Burger Court opinions. *Id.* at 3477 n.8. In Delaware v. Prouse, 440 U.S. 648 (1979), and Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977), the Court reviewed state cases that discussed both federal and state issues. *See* 103 S. Ct. at 3477 n.8. In *Prouse*, the Court based its decision to accept jurisdiction on its determination that the state rested its decision on a misinterpretation of federal constitutional provisions. *See* 440 U.S. at 652-53. Similarly, in *Zacchini*, the Court determined that the Ohio Supreme Court had based its holding on an erroneous understanding of federal law, and, thus, the Court reviewed the case on the merits. *See* 433 U.S. at 568; *see also* Oregon v. Kennedy, 456 U.S. 667, 671 (1982) (fair reading of case below indicated federal constitutional law as basis of decision).

[22] *See Long*, 103 S. Ct. at 3490 (Stevens, J., dissenting). Justice Stevens argued that in cases in which the petitioner is a state official, the Court is being asked "to rule that the state court interpreted federal rights too broadly and 'overprotected' the citizen." *Id.* The purpose of the Court, however, should be to ensure that the federal rights of citizens have been vindicated, not to control state constitutional lawmaking. *See id.*

[23] *Id.* at 3475. In a concurring opinion, Justice Blackmun noted the importance of uniformity in federal law, but criticized the Court's new approach as inefficient and likely to cause advisory opinions. *Id.* at 3483 (Blackmun, J., concurring). Justice Stevens, on the other hand, contended that the "uniformity" argument was superfluous because the need for uniformity would still exist in a state case based on an adequate nonfederal ground. *Id.* at 3491-92 (Stevens, J., dissenting).

on federal constitutional law.[24]

As predicted by Justice Stevens, this drastic revision of the adequate and independent state ground doctrine has been invoked extensively when the state court has interpreted the state constitution to provide greater protection to its citizens than the federal Constitution.[25] The *Long* doctrine may therefore cause a prolifera-

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[24] *Id.* at 3475. Justice O'Connor stated that if the independent non-federal ground is "not apparent from the four corners of the opinion," the Court will "accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 3475-76. This position is inconsistent with Justice O'Connor's prior commitment to foster independence between the state and federal court systems, and to foster comity through deference to the finality of state court decisions. *See* O'Connor, *Trends in the Relationship Between Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 814-15 (1981).

[25] *See Long*, 103 S. Ct. at 3490-91 (Stevens, J., dissenting). Since *Long*, the Court has granted certiorari in numerous cases in which the states have rendered judgments in favor of their citizens. *See* Florida v. Meyers, 104 S. Ct. 1852, 1855-56 (1984) (Stevens, J., dissenting). *But cf.* Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g., 104 S. Ct. 2267, 2276-77 (1984) (state case may have been influenced by misconception of federal law but case remanded for lack of strong federal interest). The decision on the merits in *Michigan v. Long*, it is submitted, is illustrative of the recent tendency of the Court to narrow the scope of constitutional liberties. *See* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion in the Burger Court*, 62 KY. L.J. 421, 433-34 (1974). In People v. Long, 413 Mich. 461, 320 N.W.2d 866 (1982), *rev'd*, 103 S. Ct. 3469 (1983), the Michigan Supreme Court reversed the conviction of the defendant, holding that a protective search permits only a pat-down search of the individual and not a search of the passenger compartment of his car. *Id.* at 472-73, 320 N.W.2d at 869-70. By accepting the case for review, the Supreme Court was able to extend the power of the police by permitting a search of the passenger compartment when a *Terry* protective search is in order. *Long*, 103 S. Ct. at 3480-81; *see also* Terry v. Ohio, 392 U.S. 1, 24 (1968) (police can conduct protective search of individual upon reasonable suspicion that individual is armed and dangerous). The defendant's conviction was subsequently reinstated. *See Long*, 103. S. Ct. at 3483. Justice Stevens criticized the majority's acceptance of jurisdiction, stating that "the final outcome of the state processes offended no federal interest whatever. Michigan simply provided greater protection to one of its citizens than some other State might provide or, indeed, than this Court might require throughout the country." *See id.* at 3490 (Stevens, J., dissenting). Thus, by reaching the merits of a federal question in these cases, it is submitted that the Supreme Court is infringing on the rights of a state to provide constitutional guarantees to its citizens that exceed those provided by the United States Constitution.

During the Warren Court era, the states retreated from active state constitutional lawmaking. *See* Kelman, *Foreword, Rediscovering the State Constitutional Bill of Rights*, 27 WAYNE L. REV. 413, 413 (1981); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328 (1982). This retreat was the result of the Warren Court's extension of individual liberties and the application of most of the Bill of Rights to the states by the fourteenth amendment. *See* Falk, *The Supreme Court of California 1971-1972 Foreword: The State Constitution: A More than Adequate Nonfederal Ground*, 61 CALIF. L. REV. 273, 273-74 (1973); Note, *supra*, at 1328. The Burger Court's dilution of Warren Court precedents and the hesitation of the Burger Court to protect individual liberties have renewed the interest of state courts to develop state constitutional law. *See* Kelman, *supra*, at 413-14; *Developments in the Law*, *supra*, at 1331.

tion of advisory opinions concerning state law.[26] In fact, since the state court can reinstate its decision on remand, the Burger Court's exercise of jurisdiction over state cases involving merely a potential misapprehension of federal constitutional law ensures that the power to render the decisions of the Court advisory rests solely in the hands of state court judges.[27] Since the advisory opinion doctrine has long been perceived as arising from article III to protect the power and legitimacy of the Supreme Court, any doctrine that increases the risk of advisory opinions drains the authority of the Court and impairs the federal judicial power.[28] Federal power is

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[26] *See* Comment, *supra* note 13, at 1095. In general, the Court has traditionally denied review on the merits unless an adequate non-federal ground did not exist. *See, e.g.*, Minnesota v. National Tea Co., 309 U.S. 551, 555 (1940) (uncertainty as to basis of state court decision was sufficient grounds for Supreme Court to deny review).

[27] *Cf.* Comment, *supra* note 13, at 1095 (when state reinstates its own judgment, Supreme Court has engaged in unnecessary adjudication). State court judges already have demonstrated that they will not hesitate to exercise the power to render the Supreme Court's opinion advisory. *See, e.g.*, State v. Neville, 346 N.W.2d 425, 427-28 (S.D. 1984) (although federal cases may be persuasive regarding interpretation of state constitution, state courts are final authorities); *see also* State v. Ball, 124 N.H. 226, 231-32, 471 A.2d 347, 350 (1983) (asserting right of state to interpret its own constitution more protectively than federal Constitution); *cf.* Massachusetts v. Upton, 104 S. Ct. 2085, 2090 (1984) (Stevens, J., concurring) (expression of concern for Supreme Court encroachment into areas reserved for state judges). According to some commentators, the principles of federalism demand that a state court review its own constitutional provisions before resorting to the guidelines that the Supreme Court has set for the federal Constitution. Falk, *supra* note 25, at 285; *Developments in the Law, supra* note 25, at 1329. Even prior to *Michigan v. Long*, state courts rebelled against Supreme Court opinions reversing state court holdings that construed constitutional guarantees more broadly than the Supreme Court would prefer. Note, *supra* note 11, at 297. It is not surprising, therefore, that the reaction of the states to *Michigan v. Long* has been less than receptive. *See, e.g.*, State v. Jackson, 672 P.2d 255, 261 (Mont. 1983) (Sheehy, J., dissenting) ("[t]he United States Supreme Court has no business contravening the final decisions of a state judiciary where no federal right guaranteed to all citizens has been offended").

[28] *See* Comment, *supra* note 13, at 1095-96 (*Long* presumption presents the "greatest likelihood of unnecessary adjudication and advisory opinions"). The *Pullman* abstention doctrine offers support for the proposition that the Court should defer to the states in cases involving uncertain grounds of decision in order to preserve its authority. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941). In *Pullman*, a federal equity claim had properly been brought before a district court with a pendent state claim that had not been heard in the state court. *Id.* at 497-98. The Court adopted a policy of judicial restraint by reasoning that the resolution of constitutional issues should be avoided when "a definitive ruling on the state issue would terminate the controversy." *Id.* at 498. Writing for the court, Justice Frankfurter argued that the jurisdiction of a federal court would be undermined if the federal court's determination could be overturned by a subsequent state adjudication. *Id.* at 500. "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." *Id.*; *see also* H.J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 93 (1973) (federal decision when state law is unclear would waste judicial resources and drain comity).

further reduced by filling the Supreme Court docket with nonjusticiable questions, leaving less time to resolve cases invoking significant federal interests.[29] Moreover, despite the reputation of the Burger Court for protecting federal-state comity,[30] the *Long* doctrine, by increasing the pool of state cases available for federal appellate review, interferes with the inherent power of a state court to interpret its own constitution.[31] Finally, although the *Long* Court criticized earlier decisions for impairing judicial economy through continuance or vacation and remand,[32] more judicial time is wasted by adjudicating a matter that already has been deter-

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[29] *See* Florida v. Meyers, 104 S. Ct. 1852, 1855 (1984) (Stevens, J., dissenting). The swollen docket of the Supreme Court is another reason why the state courts should actively function as state constitutional lawmakers. *See* Sheran, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 789, 792-93 (1981); *see also* H.J. FRIENDLY, *supra* note 28, at 3-4 (federal courts are faced with a breakdown because of increased workload and increased interference into state affairs); Department of Motor Vehicles v. Rios, 410 U.S. 425, 429 (1973) (Douglas, J., dissenting) (Court should not expand jurisdiction over state cases because of already large docket).

[30] *Cf.* Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that "Interfere" with State Civil Proceedings*, 29 STAN. L. REV. 29, 61-62 (1979) (Burger Court may have expanded comity in civil areas as well as criminal). *But see* Wilkes, *supra* note 25, at 433-34 ("Burger Court will not hesitate to set aside state judgments that expand federal rights beyond the limits thought desirable by the Burger Court").

[31] *See* Comment, *supra* note 13, at 1099. State courts are not required to interpret state constitutions in the same manner that the Supreme Court has construed the federal Constitution. *See* Falk, *supra* note 25, at 283 n.39; Note, *supra* note 11, at 297. Indeed, the Supreme Court has noted several times that a state constitution can confer greater rights and protections than the federal Constitution, especially in criminal matters. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 719 (1975) (state free to impose greater restrictions on police activity than those Supreme Court deems necessary); Cooper v. California, 386 U.S. 58, 62 (1967) (state may impose stricter standards on searches and seizures than those required by federal Constitution). Thus, Supreme Court precedents should be considered merely persuasive authority by state judges when construing state constitutions. *See* State v. Ball, 124 N.H. 226, 233, 471 A.2d 347, 352 (1983); State v. Neville, 346 N.W.2d 425, 427-28 (S.D. 1984); Falk, *supra* note 25, at 283. The adequate and independent state ground doctrine is not inconsistent with the principle that federal law must govern when there is a conflict between state and federal law. *See* U.S. CONST. art. VI, cl. 2. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. The Supremacy Clause, however, does not require federal courts to accept jurisdiction over all cases involving federal questions. *See id.*; Bator, *supra* note 3, at 633. Bator argues that "it is worth reminding ourselves that the supremacy clause does not say that the *federal government* shall be supreme. It doesn't even say that the *federal courts* shall be supreme. It says, fundamentally, that the *Constitution* shall be supreme." Bator, *supra* note 3, at 633 (emphasis in original).

[32] *See supra* note 23 and accompanying text.

mined under state law, or that will be rendered federally moot by a subsequent state decision on remand.[33]

The *Long* decision erases the benefits of the earlier adequate and independent state ground doctrine,[34] fails to further any of the policies that it purports to promote,[35] and increases the risk of advisory opinions.[36] It is therefore suggested that the Court should dismiss those cases in which an adequate and independent state ground arguably exists, but federally guaranteed constitutional rights are at least minimally upheld.[37] The Court should accept review, however, when an adequate and independent state ground may exist, but the decision of the state court impinges on the petitioner's guaranteed rights as protected by the United States Constitution.[38] If a state court may have misinterpreted federal constitutional law, but the grounds of decision are too obscure to determine if a federal right has been denied, it is submitted that the probability that an adequate and independent state ground does not exist should be weighed against the likelihood of a misconstruction of federal constitutional law. When the state court opinion analyzes interpretations of federal constitutional law in contravention of the recognized understanding of the Supreme Court, without reference to any state constitutional provision that would render the same result, the Court should grant a continuance and seek clarification.[39] However, if the state court acknowl-

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[33] *See* Michigan v. Long, 103 S. Ct. 3469, 3490 (1983) (Stevens, J., dissenting); South Dakota v. Neville, 459 U.S. 553, 567-68 (1983) (Stevens, J., dissenting); Comment, *supra* note 13, at 1093, 1095.

[34] *See supra* note 19 and accompanying text.

[35] *See supra* notes 29-33 and accompanying text.

[36] *See supra* note 26 and accompanying text.

[37] Even when a federal issue appears in a state case, the Supreme Court should not take jurisdiction unless the state ground is insufficient. *See* Lynch v. New York, 293 U.S. 52, 54-55 (1934). *But cf.* Comment, *supra* note 13, at 1091 (since Minnesota v. National Tea Co., 324 U.S. 551 (1940), the Court has not dismissed cases unless the probability of jurisdiction is low). A federal forum should be made available only when a fair state forum is unavailable. Bator, *supra* note 3, at 626. Since state courts are the "ultimate protection against tyrannous government," it is imprudent for the federal courts to usurp their power. *Id.* at 629; *cf.* Massachusetts v. Upton, 104 S. Ct. 2085, 2090-91 (1984) (Stevens, J., concurring) (states "remain the primary guardian of the liberty of the people").

[38] *See* 28 U.S.C. § 1257(3) (1982) (appellate jurisdiction is available for any claim specifically set up under Constitution).

[39] *See, e.g.*, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 583 (1977) (Stevens, J., dissenting) (when basis of state court action unclear, case should be remanded for clarification before deciding constitutional issue); Herb v. Pitcairn, 324 U.S. 117, 126-28 (1945) (continuance should be granted to allow state court to clarify its decision). Continuing a case for clarification achieves the goal of deference to state constitutional lawmaking.

edges a state constitutional right that is analogous to a federal constitutional right, there is no reason for the Supreme Court to intrude upon the judgment of the state court.[40] This approach is consistent with the goal of federal-state comity because it not only allows the state courts the freedom to be the final arbiters of their own constitutions,[41] but also credits state judges with the ability to determine constitutional issues.[42] In addition, it will help to reinstate an original function of the adequate and independent state ground doctrine; namely, to minimize dilution of the federal judicial power and thereby maximize the Court's authority and legitimacy.[43]

Pitcairn, 324 U.S. at 126-28. The continuance method maintains the Court's power because the Court can hear the case on the merits upon being informed by the state that the state decision was based on federal law. *See id.* State courts have concurrent jurisdiction with the federal courts to interpret federal law, *see id.* at 127; thus, an alternative approach would be for the Court to vacate and remand the case to the state court, *see* California v. Krivda, 409 U.S. 33, 35 (1972) (per curiam); Minnesota v. National Tea Co., 309 U.S. 551, 556 (1940). The state court could then reinterpret the federal law, or provide greater protections by interpreting the state constitution. *See* Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 104 S. Ct. 2267, 2278-79 (1984) (Supreme Court remanded case to state court for reinterpretation of state law); *cf.* State v. Neville, 346 N.W.2d 425, 427 (S.D. 1984) (state court based decision on state constitution after remand from Supreme Court).

[40] *See* Jankovitch v. Indiana Toll Road Comm'n, 379 U.S. 487, 489-92 (1965); Herb v. Pitcairn, 324 U.S. 117, 128 (1945); Parks v. State, 666 S.W.2d 597, 600 (Tex. Ct. App. 1984) (Levy, J., dissenting); *see also* S. Pollack, Remarks at United States Law Week's Annual Constitutional Law Conference (Sept. 14-15, 1984) (summary available in 53 U.S.L.W. 2187, 2194 (Oct. 16, 1984)) (judgment of state court should not be questioned if based upon state constitution).

[41] *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 15, at 20-21. Although some state court actions are reviewable by the Supreme Court pursuant to § 1257 of Title 28, the state courts are still the final arbiters of state law. *Id.* It is important for state courts to take an active role in state constitutional lawmaking to preserve their independence and keep the process of dispute resolution as close to the people as possible. Sheran, *supra* note 29, at 799; *see* Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting); *see also* Massachusetts v. Upton, 104 S. Ct. 2085, 2090 (1984) (Stevens, J., concurring) ("[s]tates in our federal system . . . remain the primary guardian of the people"); Bator, *supra* note 3, at 636 (state courts should be involved in constitutional lawmaking as enforcers of the law); Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694, 1700 (1981) (implementation of popularly desired policy goals more likely when government close to people).

[42] *See* Robb v. Connolly, 111 U.S. 624, 637 (1884) (acknowledging concurrent jurisdiction of states to interpret Constitution); *cf.* Sheran, *supra* note 29, at 792 (many programs have improved quality of state court judges).

[43] *Cf.* Herb v. Pitcairn, 324 U.S. 117, 128 (1945) (clarification from state court is simplest procedure for dealing with ambiguously grounded cases); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940) ("[i]ntelligent exercise of our appellate powers compels us to ask for the elimination of obscurities and ambiguities from opinions in such cases"); Lynch v. New York, 293 U.S. 52, 54-55 (1934) (Court should not take jurisdiction when ground of

HABEAS CORPUS RELIEF

The federal habeas corpus statute enables a person convicted by a state court to have his case reviewed by a federal court to determine if he is being held in violation of the federal Constitution.[44] During the years of the Warren Court, habeas corpus petitions were encouraged on the ground that "federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary judicial review."[45] Due in part to the Warren Court's expansion of habeas jurisdiction, the Burger Court has severely restricted the availability of federal habeas review of state convictions.[46] The constriction has been greatest in the area of

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decision is nonfederal).

[44] *See* 28 U.S.C. § 2254(a) (1982). Section 2254(a) provides that:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Id.

Prior to the 1867 amendments to the Judiciary Act, federal habeas corpus relief was available only to those held in federal custody. Darr v. Burford, 339 U.S. 200, 221 (1950) (Frankfurter, J., dissenting) (brief summary of the 1867 amendments to the Judiciary Act). The Court sanctioned the congressional grant of authority to the federal courts to review state cases in which the petitioner is being held in violation of federal law. *See Ex parte* Royall, 117 U.S. 241, 249 (1886). *See generally* C. WRIGHT, FEDERAL COURTS 330-46 (2d ed. 1983) (summary of history and important case law).

[45] Fay v. Noia, 372 U.S. 391, 424 (1963) (habeas corpus relief must be granted unless prisoner has "deliberately bypassed" state court proceedings); *see* Townsend v. Sain, 372 U.S. 293, 316-17 (1963) (habeas corpus relief should be granted if new facts would vindicate defendant); S. WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 141-42 (1984); Nichol, *Backing into the Future: The Burger Court and the Federal Forum*, 30 U. KAN. L. REV. 341, 356-57 (1982); *see also* Brown v. Allen, 344 U.S. 443, 508 (1953) (Habeas Corpus Act requires broad federal review). The *Fay* and *Townsend* decisions permitted the review of federal constitutional claims unless the petitioner intentionally violated a procedural rule. Annot., 96 F.R.D. 437, 522 (1983). The Warren Court's expansion of the writ of habeas corpus opened the door of the federal courthouse to state petitioners seeking protection of their constitutional rights. *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1042 (1977). The Warren Court stressed that a habeas claim exists whenever federal law has been incorrectly decided, regardless of the fairness of the litigation. *See Fay*, 372 U.S. at 427; Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 592-93 (1982).

[46] *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (criticizing *Fay* for encouraging "sandbagging" and for not deferring to state procedural rules); Stone v. Powell, 428 U.S. 465, 478-80 (1976) (Kaufman v. United States, 394 U.S. 217 (1969), was decided without proper consideration of nature of fourth amendment); Schneckloth v. Bustamonte, 412 U.S. 218, 252-58 (1973) (Powell, J., concurring) (criticizing historical analysis of habeas function in *Fay*); *see* S. WASBY, *supra* note 45, at 142; Nichol, *supra* note 45, at 357-58; *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 212, 217 & n.1; Comment, *Habeas Corpus—Limiting the Availability of Habeas Corpus After a Procedural Default*, 73 J. CRIM. L. & CRIMINOL-

fourth amendment rights.[47] In this context, a state prisoner is precluded from seeking habeas relief if he previously has been afforded an "opportunity for full and fair litigation" of his fourth amendment claim in state court.[48] This standard forecloses any meaningful federal review of fourth amendment violations by the states.[49] Since the habeas corpus statute requires a petitioner to exhaust all state remedies before coming into federal court,[50] a state prisoner inevitably will have fully litigated his fourth amendment claim in order to satisfy the exhaustion requirement.[51] By denying a federal remedy explicitly provided by Congress, the Court has attempted "to rewrite [a] jurisdictional statute . . . ," and, therefore, has encroached on the powers reserved to the legislature by the United States Constitution.[52]

OGY 1612, 1627 (1982); *see also* Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 355 (1983) (Nixon appointees to Court opposed expansion of habeas relief). *But see Sykes*, 433 U.S. at 103 (Brennan, J., dissenting) ("no rational lawyer would risk . . . 'sandbagging' ").

[47] *See* Stone v. Powell, 428 U.S. 465, 494 (1976) (state prisoner cannot obtain habeas relief based on claim that exclusionary rule should have applied to certain evidence at trial); *see also id.* at 503, 517-18 (Brennan, J., dissenting) (*Stone* is foundation for further minimization of habeas relief).

[48] *Id.* at 494. In *Stone*, the Court reasoned that the deterrent effect of the exclusionary rule would not be diminished by the denial of habeas corpus relief. *Id.* at 493. Rather, the Court feared that overturning a criminal conviction on collateral relief after two tiers of state courts had rejected a fourth-amendment claim could create disrespect for the law and the administration of justice. *Id.* at 491. In a vigorous dissent, Justice Brennan contended that the majority did not focus on a crucial point in the case—the availability of a federal forum to redress federal constitutional violations. *Id.* at 503, 511-13 (Brennan, J., dissenting); *see* 28 U.S.C. § 2254(a) (1982) (federal court "shall entertain" habeas petitions for constitutional violations).

Because the federal judiciary is protected by life tenure and a guaranteed salary, federal judges are immunized from the political pressures that may persuade a state court judge to "bend" the Constitution to avoid controversial issues. *See* U.S. CONST. art. III, § 1; *see also Stone*, 428 U.S. at 525 (Brennan, J., dissenting) ("detached federal review is a salutary safeguard"); THE FEDERALIST No. 78, at 469-71 (A. Hamilton) (1966) (tenure and salary protections of federal judiciary ensure preservation of constitutional rights); Bator, *supra* note 3, at 623 (prestige, expertise, tenure, and salary of federal judges result in greater sensitivity to federal rights).

[49] *See* Holmberg v. Parratt, 548 F.2d 745, 749 (8th Cir.) (Bright, J., dissenting) (*Stone* deprived prisoner of opportunity to have his constitutional claim reviewed by a federal court), *cert. denied*, 431 U.S. 969 (1977); Comment, *Development of Federal Habeas Corpus Since* Stone v. Powell, 1979 WIS. L. REV. 1145, 1165; *cf.* United States *ex. rel.* Petillo v. New Jersey, 562 F.2d 903, 906 (3d Cir. 1977) (whether fourth-amendment issue was decided correctly by state court is irrelevant in light of *Stone*).

[50] *See infra* notes 91-115 and accompanying text.

[51] *See* 28 U.S.C. § 2254(b)-(c) (1982); *infra* note 91.

[52] *See Stone*, 428 U.S. at 503-06 (Brennan, J., dissenting); *see also* Saltzburg, *Habeas Corpus: The Supreme Court and Congress*, 44 OHIO ST. L.J. 367, 368 (1983) (Congress, not

The Burger Court, however, has placed further restrictions on habeas relief that affect the availability of habeas review regardless of the substantive basis of the petitioner's federal claim.[53] Most notably, a state prisoner can no longer obtain habeas relief if he has committed a procedural default during the course of the state proceedings against him, unless a vague and restrictive "cause and prejudice" test is met.[54] A habeas petitioner is also precluded from plenary federal review if he has failed to exhaust all available state remedies with respect to any one claim in his petition.[55]

State Procedural Defaults

In *Fay v. Noia*,[56] the Warren Court recognized that, in limited instances, a habeas petitioner's failure to comply with a state procedural rule could constitute grounds for dismissal of the writ.[57] The Warren Court, while concerned primarily with providing impartial federal review of alleged constitutional violations by a state,[58] recognized a federal responsibility to avoid undue interfer-

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the Court, should be weighing competing policy considerations involved in controversy over scope of habeas jurisdiction); *cf.* Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts: An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287, 300 (1983) (Court's habeas decisions reflect policies of "oft rejected proposal[s] to Congress").

[53] *Stone*, 428 U.S. at 511-12 (Brennan, J., dissenting); *see* Remington, *supra* note 52, at 287-88; Rosenn, *supra* note 46, at 362.

[54] *See infra* notes 71-72 and accompanying text; *cf.* Allen v. McCurry, 449 U.S. 90, 105 (1980) (failure to get habeas relief collaterally estops petitioners in 42 U.S.C. § 1983 action). *But cf.* Henry v. Mississippi, 379 U.S. 443, 447-49 (1965) (Court will defer to state only when petitioner has not substantially complied with a legitimate state procedure).

[55] *See infra* note 94.

[56] 372 U.S. 391 (1963).

[57] *See id.* at 438-40.

[58] *See id.* at 422-24. By extending the habeas remedy to state prisoners, and providing for a trial of the facts anew, Congress designed a habeas remedy that was "additional to and independent of direct Supreme Court review." *See id.* at 415-16; Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385-86 (1867); *see also Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1867) (amendment to habeas statute broadens habeas jurisdiction to cover every constitutional violation); CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866) (statutory extension of habeas corpus enlarges liberties). *See generally* Peller, *supra* note 45, at 610-44 (historical perspective of Habeas Corpus Act and cases interpreting Act require broad federal collateral review). Arguably, the federal interests compelling habeas review necessitate habeas jurisdiction that is more extensive than appellate jurisdiction of state cases. *Compare Fay*, 372 U.S. at 429-33 (interest of state in compliance with an important and legitimate procedural rule is irrelevant in habeas proceeding) *with* Henry v. Mississippi, 379 U.S. 443, 446-47 (1965) (adequate and independent state procedural ground may preclude federal appellate review when state asserts legitimate reason for compliance). Indeed, the right of an individual to habeas corpus relief is specifically enumerated in the Constitution. U.S. CONST. art. I,

ence with state court proceedings.[59] Thus, the *Fay* Court held that unless a state prisoner's failure to comply with a state procedural rule was the result of a "deliberate bypass" of the rule by the prisoner for the purpose of "saving" the federal constitutional claim for habeas review, a federal court should review the petition.[60] The deliberate bypass rule denied habeas review only to fully informed state prisoners who intended to violate state court procedural rules.[61]

In *Wainwright v. Sykes*,[62] the Burger Court explicitly rejected the deliberate bypass standard, holding that, absent "cause and prejudice," a petitioner who, knowingly or not, fails to comply with any state court procedural rule will be denied federal habeas review on the merits.[63] Thus, even when the interest of the state in

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§ 9, cl. 2 ("[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it").

[59] *See* Henry v. Mississippi, 379 U.S. 443, 447 (1965) (Court will defer to adequate and independent state procedural ground when there is legitimate state reason for compliance). *But see* Barr v. City of Columbia, 378 U.S. 146, 149 (1964) (Court will not defer to state procedural requirement that is not applied fairly). While the *Henry* Court acknowledged that the adequate and independent state ground doctrine applied to both state substantive and procedural grounds, the Court noted that adherence to the doctrine was less compelling when the state court decision was based on a state procedural ground. *Henry*, 379 U.S. at 446-47. Accordingly, the Court concluded that to ensure the vindication of constitutionally guaranteed rights in such cases, federal appellate review should not be forfeited unless the state has a legitimate interest in preserving the important state procedural rule that has been waived. *See id. But cf.* Fay v. Noia, 372 U.S. 391, 426-27 (1963) (because it is intended as remedy for unconstitutional restraint, habeas corpus jurisdiction cannot be diminished by anything that may occur in state court proceeding). Furthermore, although a state procedural rule is arguably legitimate, a federal forum will not be forfeited by the petitioner if he complied substantially with an alternate, legitimate rule. *See Henry*, 379 U.S. at 448-49.

[60] 372 U.S. at 438. In *Fay*, the petitioner applied for federal habeas relief although he had not made a timely appeal in state court, resulting in an unexhausted claim. *Id.* at 394-96. The Court noted that the doctrines of comity and finality should not outweigh the prisoner's right to a federal forum to hear his constitutional claim. *See id.* at 419-20, 424. Thus, unless the petitioner himself, not his lawyer, deliberately bypassed the state procedural rule, habeas jurisdiction would be granted. *See id.* at 439. *But see* Sallet & Goodman, *Closing the Door to Federal Habeas Corpus: A Comment on Legislative Proposals to Restrict Access in State Procedural Default Cases*, 20 AM. CRIM. L. REV. 465, 470 (1983) (requiring deliberate bypass by prisoner himself nearly always results in waiver).

[61] *See Fay*, 372 U.S. at 439.

[62] 433 U.S. 72 (1977).

[63] *See id.* at 87-88. In *Sykes*, a state prisoner was denied habeas corpus relief because of his failure to comply with the contemporaneous-objection rule of Florida. *Id.* at 85-86. The Court adopted the "cause and prejudice" test of Francis v. Henderson, 425 U.S. 536, 542 (1976), which held that a petitioner must show why the state procedural rule was not complied with and that the loss of opportunity resulting from such noncompliance actually prejudiced the defendant's trial. *Sykes*, 433 U.S. at 90-91. The Court then remanded the case to the district court to dismiss the writ because the petitioner had not explained his

enforcing the bypassed rule is weak, the Burger Court is foregoing federal jurisdiction without examining the validity of the substantive federal claim.[64]

While the *Sykes* case shifted the burden of proof regarding habeas jurisdiction to the petitioner,[65] two subsequent opinions, *Engle v. Isaac*[66] and *United States v. Frady*,[67] have placed further demands on habeas petitioners by broadly defining what will not constitute "cause" and "prejudice."[68] In *Isaac*, after the petitioners were imprisoned the Ohio Supreme Court reinterpreted the state constitution, changing the burden of proof regarding self-defense.[69] The petitioners argued that they had "cause" for failing to comply with a state contemporaneous objection rule, since at the time of the state trial a constitutional violation did not yet exist.[70] Al-

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failure to object at trial and because other evidence of guilt against the petitioner was substantial. *Id.* The *Sykes* Court, however, did not define the meaning of "cause" and "prejudice," deferring such clarification to later cases. *See id.* at 91.

The cause and prejudice standard was first applied to restrict habeas relief under 28 U.S.C. § 2255 (1982) when an attorney of a federal prisoner failed to demonstrate cause for and prejudice resulting from failure to object to the composition of a grand jury prior to trial. *See* Davis v. United States, 411 U.S. 233, 242-43 (1973). Based on considerations of comity, the Court subsequently applied the cause and prejudice standard to state convicts applying for relief under 28 U.S.C. § 2254 (1982). *See Francis*, 425 U.S. at 541-42. *But see id.* at 545-50 (Brennan, J., dissenting) (majority has repudiated deliberate bypass standard of *Fay v. Noia* and has ignored legislative history of 28 U.S.C. § 2254 (1982)).

[64] *Cf. Sykes*, 433 U.S. at 100 n.2 (Brennan, J., dissenting) ("federal courts possess the *power* to look beyond a state procedural forfeiture") (emphasis in original). Denying review of the merits because of an inadvertent procedural forfeiture implicitly contravenes the statutory language mandating fact-finding by the federal court hearing the petition. *See* 28 U.S.C. § 2254(d) (1982) (federal court shall review facts anew when state fact-finding process is inadequate).

[65] *Compare* Fay v. Noia, 372 U.S. 391, 439 (1963) (creating presumption against waiver unless court is convinced that petitioner deliberately bypassed a state procedure) *with* Wainwright v. Sykes, 433 U.S. 72, 87 (1976) (defendant must show "cause" for a procedural default before habeas claim will be reviewed on the merits).

[66] 456 U.S. 107 (1982).

[67] 456 U.S. 152 (1982).

[68] *See infra* notes 71-72 and accompanying text.

[69] 456 U.S. at 111. When the respondents were initially tried, the Ohio courts had required a defendant asserting self-defense to prove this defense by a preponderance of the evidence. *See id.* at 110. After the respondents were convicted, the Ohio Supreme Court held that a defendant had the burden of production, not persuasion, with regard to a claim of self-defense. *Id.* at 111; *see* State v. Robinson, 47 Ohio St. 2d 103, 109-10, 351 N.E.2d 88, 93-94 (1976). Isaac appealed his conviction based on the intervening change in the law. *Isaac*, 456 U.S. at 115. The Ohio Supreme Court rejected Isaac's claim because he had failed to object at trial. *Id.* The Sixth Circuit reversed the district court's denial of jurisdiction, holding that Isaac had met the "cause" requirement since an objection at trial would have been futile. Isaac v. Engle, 646 F.2d 1122, 1128 (6th Cir. 1980), *rev'd*, 456 U.S. 107 (1982).

[70] 456 U.S. at 129-31.

though the petitioners' counsel were not expected to predict future changes in the law, the *Isaac* Court nevertheless denied the writ, holding that cause was not established by the mere "futility of presenting an objection to the state courts."[71] In *Frady*, a case involving a habeas petition by a federal prisoner, the Court held that the petitioner failed to show actual "prejudice" because he had not presented any colorable evidence indicating that the trier of facts might reverse the outcome of the case.[72]

Sykes, Isaac, and *Frady* combine to reveal an unprecedented deference to state court procedural rules by the Burger Court.[73] In other jurisdictional contexts, the Court has recognized the supremacy of federal law unless the federal court is interfering with state *substantive* law.[74] Recognizing the important federal interest of providing a federal forum when a claim involves litigants from different states,[75] the Court has construed broadly its congressionally granted rulemaking authority so that litigants from different states are ensured uniform procedure in a federal court.[76]

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[71] *Id.* In a recent decision, Reed v. Ross, 104 S. Ct. 2901 (1984), the Court held that the novelty of a constitutional issue at the time of the state court action could establish cause, *id.* at 2910. The durability of this slight retreat from *Isaac* is questionable, however, since the plurality opinion, written by Justice Brennan, was joined by only three justices. *See id.* at 2912, 2913. *See generally* Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 FORDHAM L. REV. 53, 58 (1982) (precedential effect of decision diminished when justices do not agree on given result for same reasons).

[72] 456 U.S. at 171. Writing for the *Frady* Court, Justice O'Connor rejected the petitioner's contention that the "plain error" standard in Rule 52(b) of the Federal Rules of Criminal Procedure should be applied to his case. *Id.* at 166-67; *see* FED. R. CRIM. P. 52(b) ("[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court"); *cf.* Preiser v. Rodriguez, 411 U.S. 475, 489-90 (1973) (when petitioner's challenge to imprisonment could be brought under habeas corpus statute, habeas corpus requirements cannot be circumvented by a claim under the Civil Rights Act).

[73] *See* Engle v. Isaac, 456 U.S. 107, 136 (1982) (Stevens, J., dissenting); Comment, *supra* note 46, at 1622; *infra* notes 81-82 and accompanying text; *cf.* Remington, *supra* note 52, at 299-300 (suggesting that even adequacy of state procedure is unimportant as long as claim has been litigated in state court). The constant outcry of politicians and the public alike is that the courts have been too lenient in letting criminals go free due to procedural technicalities. *See generally* E. Wright, *Court at the Crossroads*, Time Mag., Oct. 8, 1984, at 33, col. 2, 3. *But cf.* Bator, *supra* note 3, at 623 (federal courts should be immune from political pressures). It is suggested that the procedural barriers raised by the Burger Court have swung the pendulum so far that the unjustly incarcerated may no longer be freed due to procedural technicalities.

[74] *See infra* notes 75-77 and accompanying text.

[75] *See* C. WRIGHT, *supra* note 44, § 23, at 128.

[76] *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 471-74 (1965). When Congress formulates a rule that rationally is capable of classification as a procedural rule, it is deemed constitutional and will be enforced unless it interferes with state substantive law. *See id.*

Specifically, a state procedural rule is applied in a diversity case only if the application of the state rule would yield a different outcome than if federal law were applied.[77] Similarly, by granting the federal judiciary the broad power to pursue fresh facts in habeas cases, Congress has demonstrated a distrust of the ability of state courts to provide adequate federal constitutional guarantees to state prisoners,[78] and has conferred upon the federal courts the responsibility to preserve the important federal interest of vindicating the rights of those who are unjustly imprisoned.[79] It is suggested that this significant federal interest clearly outweighs the weak state interest of ease in state judicial administration. Nevertheless, by requiring the habeas petitioner to negotiate a maze of procedural barriers before his constitutional claim can be heard on the merits, the Court has placed the interests of comity and deference to state judicial administration above the strong federal interest of vindicating constitutional violations.[80]

It is submitted that the restrictive definitions of "cause" and "prejudice" adopted by the Court have resulted in a substantial injustice, possibly of constitutional dimensions, to the petitioner. Even in cases of fundamental unfairness, the *Isaac* "cause" standard traps the habeas petitioner by denying him habeas relief when his "astute counsel" overlooks an esoteric constitutional claim.[81] By denying habeas relief premised on the inadvertent error of an attorney that does not even reach the level of a constitutional claim of ineffective assistance of counsel, the restrictive cause standard precludes the petitioner from relief without regard

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[77] *See id.* at 469; M. REDISH, *supra* note 6, at 177.

[78] *See* Fay v. Noia, 372 U.S. 391, 401 n.9, 415-16 (1963) (expansion of habeas corpus act to state prisoners was passed in anticipation of post-Civil War abuses); Peller, *supra* note 45, at 619 (Congress passed 1867 Act to enforce newly created federal rights).

[79] *See* Brown v. Allen, 344 U.S. 443, 508 (1953); *see also* Peller, *supra* note 45, at 618 (language of 1867 Act requires broad federal collateral review).

[80] *See* Remington, *supra* note 52, at 299-300; Rosenn, *supra* note 46, at 362.

[81] Engle v. Isaac, 456 U.S. 107, 133-34 (1982). The current Ohio rule on the burden of proving self-defense had not yet been pronounced by the Ohio courts at the time of the defendant's procedural default. *Id.* at 110-11. The Supreme Court determined that the petitioner's counsel should have relied on the general due process standards of *In re Winship*. *Id.* at 131, 133. In *Winship*, the Court held that a defendant cannot be convicted except upon proof beyond a reasonable doubt of every element of the charge against him. *In re* Winship, 397 U.S. 358, 364 (1970). Based on the *Winship* decision, the *Isaac* Court found that the petitioner's attorney had the "tools" to raise the constitutional claim at the time of trial. *Isaac*, 456 U.S. at 133. The Court recognized that not every attorney would have gleaned this tenuous connection, yet declared that the Constitution did not guarantee "astute counsel." *Id.* at 134; *see supra* note 71 and accompanying text.

to the substance of his claim.[82] To avoid this result, the petitioner's attorney will be encouraged to raise every possible constitutional claim in state court, thereby hindering comity by overloading state courts with a plethora of potentially meritless claims.[83] Finally, by requiring the petitioner to present a "colorable claim of innocence" to meet the actual prejudice standard of *Frady*,[84] the Court has implicitly overruled *In re Winship*[85] by shifting the burden of proof from the prosecutor to the defendant.[86]

It is suggested that the Court reinstate the *Fay* "deliberate bypass" standard, accompanied in certain instances by a showing of fundamental unfairness. To protect the petitioner's right to a federal forum, neither the petitioner nor his attorney may knowingly forego an important state procedural rule as a tactical means of obtaining access to a federal forum.[87] If the petitioner's attorney

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[82] *See* Remington, *supra* note 52, at 297; Sallet & Goodman, *supra* note 60, at 481; *cf.* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 467 (1980) ("*Wainwright* seemingly mandates the continued incarceration of factually innocent defendants in order to deter defense attorney misconduct").

[83] *See* Remington, *supra* note 52, at 297 n.47. Aware of the impropriety of punishing habeas petitioners for the ministerial errors of their attorneys, the Court has retreated slightly from the procedurally difficult cause standard. *See* Reed v. Ross, 104 S. Ct. 2901, 2910 (1984) (defendant has "cause" when legal basis of a constitutional claim is "not reasonably available to counsel").

[84] United States v. Frady, 456 U.S. 152, 170-71 (1982). The notion that a habeas petitioner should include a colorable claim of innocence in his petition was espoused by Judge Friendly. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970) (defendant must show fair probability that alleged error would have raised reasonable question of doubt about his guilt in mind of trier of facts). The Burger Court has relied explicitly on Judge Friendly's argument. *See* Engle v. Isaac, 456 U.S. 107, 126 & n.31 (1982); *see also* Peller, *supra* note 45, at 593 (Supreme Court supports colorable claim of innocence requirement); Seidman, *supra* note 82, at 449-59 & n.69 (same).

[85] 397 U.S. 358 (1970). For a brief discussion of the *Winship* case, see *supra* note 81.

[86] *See* Sallet & Goodman, *supra* note 60, at 478; Comment, Lundy, Isaac & Frady: *A Trilogy of Habeas Corpus Restraint*, 32 CATH. U.L. REV. 169, 215 (1983). It is axiomatic that the prosecutor is required to prove each and every element of a crime beyond a reasonable doubt. *In re* Winship, 397 U.S. 358, 364 (1970); *see supra* note 81.

[87] *See* Fay v. Noia, 372 U.S. 391, 438-40 (1963) (habeas relief should be precluded when petitioner "deliberately by-passed" a state procedural ground); *see also* United States *ex rel.* Allum v. Twomey, 484 F.2d 740, 744-45 (7th Cir. 1973) (criticizing requirement that client participate in every tactical decision of competent counsel); Sallet & Goodman, *supra* note 60, at 481 (criminal defendants must sometimes be bound to their attorneys' decisions); *cf.* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984) (federal courts are empowered to go beyond procedural forfeiture to protect constitutional rights); Runnels v. Hess, 653 F.2d 1359, 1364 (10th Cir. 1981) (non-deliberate attorney error may constitute "cause"); Rachel v. Bordenkircher, 590 F.2d 200, 204 (6th Cir. 1978) (inexperience of attorney constitutes "cause"). Requiring the dismissal of a habeas claim when there has been a deliberate bypass

deliberately bypassed a legitimate state procedural rule, the petitioner should still be permitted to obtain habeas relief if the effect of the procedural default resulted in fundamental unfairness.[88] Specifically, the effect of a procedural default is fundamentally unfair when the petitioner loses his opportunity to raise a claim that could have swayed the trier of facts when deciding the issue of guilt.[89] This two-prong approach ensures a habeas petitioner a federal remedy for actual constitutional abuses while limiting access to a federal forum only to meritorious claims.[90]

Exhaustion of State Remedies

The Federal Judiciary Act requires a petitioner for a writ of habeas corpus to exhaust all reasonably available state remedies before applying for the writ.[91] The exhaustion requirement is in-

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of an important state rule fosters comity by deferring to state procedure when the state has a legitimate reason for compliance with the rule. *See* Henry v. Mississippi, 379 U.S. 443, 447 (1965); *see also* Sallet & Goodman, *supra* note 60, at 476-78 (adequacy and independence of state procedural ground is threshold issue).

[88] *See* Engle v. Isaac, 456 U.S. 107, 136 & n.1 (1982) (Stevens, J., concurring in part and dissenting in part) (procedural foreclosure of federal habeas relief should result only when petitioner has received fundamentally fair trial); Rose v. Lundy, 455 U.S. 509, 547-48 (1982) (Stevens, J., dissenting) (habeas relief should be confined to cases truly involving fundamental unfairness); *cf.* Wainwright v. Sykes, 433 U.S. 72, 95 (1977) (Stevens, J., concurring) ("if the constitutional issue is sufficiently grave, even an express waiver by the defendant himself may sometimes be excused"). By requiring the petitioner to make an additional showing of fundamental unfairness if his attorney deliberately bypassed a state procedure, the possibility of "sandbagging" is reduced. *Cf. Sykes*, 433 U.S. at 89 (requiring dismissal only when petitioner himself deliberately bypasses state procedure encourages sandbagging). "Sandbagging" occurs when a petitioner's attorney delays raising a constitutional issue in the state court for the purpose of saving the claim for a federal habeas proceeding if the petitioner loses in state court. *Id.*

[89] *See* Rose v. Lundy, 455 U.S. 509, 542 n.7 (1982) (Stevens, J., dissenting).

[90] *Cf.* Engle v. Isaac, 456 U.S. 107, 136 (1982) (Stevens, J., concurring in part and dissenting in part) (claim merely attaching "constitutional label" to habeas petition should be denied); Fay v. Noia, 372 U.S. 391, 401-02, 438-39 (1963) (individual entitled to immediate release from unconstitutional imprisonment unless he has deliberately waived such right).

[91] 28 U.S.C. § 2254(b)-(c) (1982). The exhaustion requirement provides:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
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> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.

Id.

tended to foster comity and to preserve the role of the state court in enforcing federal law.[92] Recently, in *Rose v. Lundy*,[93] the Supreme Court interpreted these subsections of the habeas statute to preclude federal habeas corpus relief when the petition contains both exhausted and unexhausted claims.[94] *Lundy* confronts the habeas petitioner with two choices when he presents such a mixed petition to the district court: he may return to state court to exhaust the unexhausted claims or he may remove the unexhausted claims from the petition and proceed to federal court.[95] The *Lundy*

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[92] *See* Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam) (exhaustion requirement of § 2254(b) and (c) "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights"); H.R. REP. No. 308, 80th Cong., 1st Sess. A180 (1947) (citing *Ex parte* Hawk, 321 U.S. 114, 117 (1944)); *see also* Rose v. Lundy, 455 U.S. 509, 515, 518 (1982) ("exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings"); Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490 (1973) (exhaustion doctrine balances interests of federalism with need to preserve writ of habeas corpus).

[93] 455 U.S. 509 (1982).

[94] *Id.* at 510, 518-19. A habeas petition containing claims that have already been exhausted in the state court, as well as claims that have not been determined by the state court, is deemed a mixed petition. *See id.* at 510. The "total exhaustion" rule necessitates the dismissal of such a petition. *See id.*

Prior to *Rose v. Lundy*, there had been a split among the circuit courts over the disposition of mixed habeas petitions. *Id.* at 513 n.5. *Compare* Galtieri v. Wainwright, 582 F.2d 348, 355 (5th Cir. 1978) (requiring total exhaustion) *and* Gonzales v. Stone, 546 F.2d 807, 810 (9th Cir. 1976) (total exhaustion required unless prevented by reasonable circumstances) *with* Katz v. King, 627 F.2d 568, 574 (1st Cir. 1980) (reviewing exhausted claims in mixed petition) *and* Cameron v. Fastoff, 543 F.2d 971, 976 (2d Cir. 1976) (same). While only the Fifth and Ninth Circuits have dismissed all claims in mixed petitions, no circuit has accepted such petitions when the unexhausted claims were interwoven with, or pertinent to, the resolution of the exhausted claims. *See, e.g.*, Triplett v. Wyrick, 549 F.2d 57, 59 (8th Cir. 1977) (per curiam) (dismissal when exhausted claims "closely intertwined" with unexhausted claims); United States *ex rel.* DeFlumer v. Mancusi, 380 F.2d 1018, 1019 (2d Cir. 1967) (per curiam) (claims so related as to require dismissal); *cf.* Miller v. Hall, 536 F.2d 967, 969 (1st Cir. 1976) (accepting review of exhausted claims in mixed petition since such claims were unrelated to unexhausted claims). *See generally* Casenote, *Total Exhaustion of State Remedies in Habeas Corpus Proceedings*, 24 B.C.L. REV. 1339, 1341 (1983) (interwoven mixed petition logically requires simultaneous presentation of exhausted and unexhausted claims). Even the Fifth and Ninth Circuits, which advocated total exhaustion, permitted review of the exhausted claims in mixed petitions when the district court had mistakenly considered the exhausted claims, *see, e.g.*, Garrison v. McCarthy, 653 F.2d 374, 376 (9th Cir. 1981) (review permitted because district court reached merits of exhausted claim), or when the petitioner provided a reasonable explanation for his failure to exhaust, *see Lundy*, 455 U.S. at 529 n.7 (Blackmun, J., concurring); Casenote, *supra*, at 1343. *Lundy*, however, required that the "total exhaustion" rule be "rigorously enforced." 455 U.S. at 518.

[95] *Lundy*, 455 U.S. at 510. In *Lundy*, the respondent had been convicted by a jury in a Tennessee state court of rape and a crime against nature. *Id.* The Tennessee Court of Criminal Appeals affirmed the conviction and the Tennessee Supreme Court denied review of the

Court maintained that a total exhaustion requirement would advance both state and federal interests by fostering comity and finality, while providing a more complete factual record for federal review.[96]

The *Lundy* plurality noted that a petitioner who drops an unexhausted claim to proceed with his exhausted claims in federal court might forfeit later federal review of his unexhausted claim under Rule 9(b) of the habeas corpus statute.[97] Rule 9(b) requires

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case. *Id.* at 511 & n.2. The respondent also was denied relief by the Knox County Criminal Court. *Id.* at 510. Subsequently, the respondent filed a habeas petition in federal district court alleging four grounds of relief, including two that previously had not been exhausted in the Tennessee courts. *See id.* at 511.

[96] *Id.* at 518-19. According to Justice O'Connor, "[a] rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Id.*

The *Lundy* Court determined that the "mixed petition" issue had not been addressed by the statute itself, the legislative history, or pre-statutory case law. *See id.* at 515-17; Case Note, *A Federal District Court Must Dismiss in its Entirety A State Prisoner's Habeas Corpus Petition Containing Both Exhausted and Unexhausted Claims of Constitutional Violations:* Rose v. Lundy, 32 DRAKE L. REV. 1057, 1059 (1982-1983). Consequently, the Court based its decision on the policies underlying the exhaustion requirement. *See Lundy*, 455 U.S. at 516-20; Casenote, *supra* note 94, at 1344.

[97] *Lundy*, 455 U.S. at 520-21 (dictum). Chief Justice Burger, and Justices Powell and Rehnquist, joined in Part IIIC of the plurality opinion written by Justice O'Connor. *Id.* at 509. In his dissent, Justice Brennan noted that the plurality opinion misconstrued the purpose of the "abuse of the writ" sanction contained in Rule 9(b). *Id.* at 535 (Brennan, J., concurring in part and dissenting in part). The dissent maintained that both the legislative history of Rule 9(b) and case law indicate that the "abuse of the writ" doctrine should be used to dismiss a case only when the petitioner has "knowingly" or "deliberately" abandoned or withheld claims that could have been included in the first petition. *Id.* at 534-36 (Brennan, J., concurring in part and dissenting in part); *see* 28 U.S.C. § 2254 (1982); *see also* 28 U.S.C. § 2254 Rule 9(b) advisory committee note (citing Sanders v. United States, 373 U.S. 1, 17-18 (1963)) (petitioner's failure to assert all claims in original petition must be "inexcusable").

Even without the "abuse of the writ" sanction, the pro se petitioner who is unaware of his option to amend his petition is at a disadvantage. *See Lundy*, 455 U.S. at 530 (Blackmun, J., concurring); Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393, 435 (1983). *But cf.* Note, Rose v. Lundy: *The Supreme Court Adopts the Total Exhaustion Rule for Review of Mixed Habeas Corpus Petitions*, 1984 WIS. L. REV. 859, 879-80 (plurality's discussion of abuse of the writ may result in delay due to broadening of the abuse standard by lower federal courts); Note, *Habeas Corpus — Much Ado About Very Little: The Total Exhaustion Rule*, 73 J. CRIM. L. & CRIMINOLOGY 1641, 1648 (1982) (without "abuse of the writ" sanction, policies of total exhaustion rule are undermined since dismissed mixed petition may be refiltered through federal courts). The total exhaustion rule permits a petitioner to remove unexhausted claims from a habeas petition to avoid complete dismissal, *see supra* note 94 and accompanying text, while prior to *Lundy*, most lower court judges *sua sponte* dropped the unexhausted claims from the mixed petition, *see supra* note 94. By relinquishing the discretion of the district court judges to remove the claims *sua sponte*, the Court anoma-

the dismissal of a writ of habeas corpus when the court finds that the petitioner has abused the writ by deliberately excluding new grounds from an earlier petition.[98] The interpretation by the plurality of Rule 9(b) effectively disregards the intent of Congress to deny only those writs that contain grounds that the petitioner "knowingly" and "deliberately" avoided in his first petition.[99] Furthermore, by initially refusing plenary review for failure to exhaust, and later barring habeas relief under Rule 9(b), the plurality has created an insurmountable procedural hurdle that precludes any habeas petitioner who has unwittingly included a meritorious unexhausted claim in his habeas petition from securing a federal forum.[100] It is suggested that the purposes of the exhaustion doctrine are adequately served by allowing the district courts discretion to consider whether to review some exhausted claims in a mixed petition.[101] A "total exhaustion" rule, however, impairs federal-state comity because state courts are compelled to resolve frivolous unexhausted claims.[102]

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lously assumes that the unwitting pro se petitioner will be aware of his option to amend his habeas petition to exclude unexhausted claims. *Cf. Lundy*, 455 U.S. at 530 (Blackmun, J., concurring) (petitioner's opportunity to amend depends on his awareness of this option); Recent Decision, 21 DUQ. L. REV. 309, 327 (1982) (typical petitioner will be unaware of his option to amend, thwarting judicial economy). *But cf.* Yackle, *supra*, at 434-35 (if judge advises petitioner, waste of judicial resources may result since petitioner may return to state court and exhaust frivolous claims).

[98] 28 U.S.C. § 2254 Rule 9(b) (1982). Rule 9(b) provides, in pertinent part:

> A second or successive petition may be dismissed if . . . new and different grounds are alleged, [and] the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Id.

[99] *Lundy*, 455 U.S. at 533-36 (Brennan, J., concurring in part and dissenting in part); *see* 28 U.S.C. § 2254 Rule 9(b) advisory committee note (1982) (quoting Sanders v. United States, 373 U.S. 1, 17-18 (1963)) ("if a prisoner deliberately withholds one of two grounds for federal collateral relief" from his first petition, he may be deemed to have violated rule 9(b)"); *cf.* Fay v. Noia, 372 U.S. 391, 439-40 (1963) (petitioner who neglected state remedy will be denied habeas relief only when state procedures have been deliberately bypassed). *See generally* Note, Rose v. Lundy *and Rule 9(b): Will the Court Abuse the Great Writ?*, 49 BROOKLYN L. REV. 335, 352 & n.101 (1982) (*Sanders* Court adopted deliberate bypass standard of *Fay*).

[100] *Cf. Lundy*, 455 U.S. at 529-30 (Blackmun, J., concurring) (total exhaustion requirement will "trap the unwary *pro se* prisoner . . . whose only aim is to secure a new trial or release from prison").

[101] *See id.* at 523-24 (Blackmun, J., concurring); Note, *Federal Habeas Corpus: The Exhaustion Doctrine and Mixed Petitions*—Rose v. Lundy *and "Exhaustion" Under the Illinois Post-Conviction Remedies*, 1983 U. ILL. L. REV. 515, 523; *cf.* Fay v. Noia, 372 U.S. 391, 438 (1963) (federal judges hearing habeas claims have implicit discretion to deny relief when petitioner deliberately bypassed state procedure).

[102] *Lundy*, 455 U.S. at 525 (Blackmun, J., concurring); *see* Haggins v. Warden, 715 F.2d

In an effort to mitigate the harshness of the rule, some lower federal courts have carved exceptions to the total exhaustion requirement.[103] For example, a federal court may review a mixed petition on the merits when the unexhausted claim is frivolous and would require "exhaustion of a nullity."[104] In addition, a mixed petition may be reviewed when state law renders the return of the state claim to the state court futile because the substance of the unexhausted claim has been specifically reviewed and rejected by the state court.[105] Indeed, a district court generally may dismiss any unexhausted claim on the ground that it is highly unlikely to provide relief to the petitioner.[106]

A minority of the circuits has attempted to alleviate the effect of the total exhaustion rule by conducting plenary review of exhausted claims in a mixed petition when the state explicitly waives a habeas petitioner's failure to exhaust all claims.[107] These circuits

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1050, 1054 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 980 (1984).

[103] *See infra* notes 104-109 and accompanying text. Several of the circuit courts have paid lip service to *Lundy* before carving exceptions into the "total exhaustion" rule. *See, e.g.*, Haggins v. Warden, 715 F.2d 1050, 1054 (6th Cir. 1983) (frivolous claim exception), *cert. denied*, 104 S. Ct. 980 (1984); Thompson v. Wainwright, 714 F.2d 1495, 1499 (11th Cir. 1983) (en banc) (state waived total exhaustion), *cert. denied*, 104 S. Ct. 2180 (1984); Hawkins v. West, 706 F.2d 437, 437-38 (2d Cir. 1983) (futility exception). *But cf.* Snethen v. Nix, 736 F.2d 1241, 1244 (8th Cir. 1984) (under *Lundy*, district courts must dismiss all mixed petitions).

[104] *See* Haggins v. Warden, 715 F.2d 1050, 1054 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 980 (1984). In *Haggins*, the court decided a mixed petition case on the merits because the equal protection claim that the defendant advanced was "patently frivolous." *Id.*

[105] *See* Hawkins v. West, 706 F.2d 437, 440-41 (2d Cir. 1983) (useless to send claim back to state court when federal claim yields same result); Williams v. Holbrook, 691 F.2d 3, 6 (1st Cir. 1982) (exhaustion requirement satisfied when substance of claims brought before state and federal court are the same, even though federal claims might be somewhat reformulated); *see also* Matlock v. Rose, 731 F.2d 1236, 1240 (6th Cir. 1984) (when state courts foreclose corrective process, returning unexhausted claim to state court furthers no state interest, thus undermining reasons for *Lundy* "total exhaustion" rule); Beaty v. Patton, 700 F.2d 110, 112 (3d Cir. 1983) (dismissal for exhaustion is unnecessary when attempt to invoke state procedure would be futile); Zelenka v. Israel, 699 F.2d 421, 423 (7th Cir. 1983) (exhaustion requirement is waived when state court has held adversely to petitioner's argument in other cases); *cf.* Perry v. Fairman, 702 F.2d 119, 121 (7th Cir. 1983) (petition should be dismissed for failure to exhaust only if there is "near certainty" that state court will entertain claim in question).

[106] *See* Haggins v. Warden, 715 F.2d 1050, 1054 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 980 (1984); Hawkins v. West, 706 F.2d 437, 440 (2d Cir. 1983) (dictum).

[107] *See, e.g.*, Thompson v. Wainwright, 714 F.2d 1495, 1501 (11th Cir. 1983) (en banc) (state, through attorney general, can wave exhaustion), *cert. denied*, 104 S. Ct. 2180 (1984); Sweezy v. Garrison, 694 F.2d 331, 333 (4th Cir. 1982) (per curiam) (attorney general unconditionally waived exhaustion request), *cert. denied*, 461 U.S. 908 (1983); *cf.* Lacy v. Gabriel, 732 F.2d 7, 12 (1st Cir.) (habeas petition cannot be invalidated if state raises unexhausted

contend that permitting a state to waive its right of initial review furthers the goals of comity, finality, and conservation of judicial resources.[108] Incidental to the waiver doctrine, some circuit courts also have permitted the continuance of an action pending a determination of the unexhausted claims in the state court, thereby granting the state court discretion to review the unexhausted claims on the merits or waive initial jurisdiction.[109]

Thus, by creating extensive exceptions to *Lundy*, the circuits have grappled with the inflexibility of the total exhaustion requirement.[110] Through these exceptions, the circuits not only have cast doubt on the propriety of the *Lundy* rule, but also have paved the way for its inevitable overruling.[111] Clearly, an approach allowing the district courts some discretion is preferable to a per se rule requiring the dismissal of all claims in a mixed petition.[112] In an

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claim), *cert. denied*, 105 S. Ct. 195 (1984); Butler v. Rose, 686 F.2d 1163, 1167 (6th Cir. 1982) (exhaustion not required when district court *sua sponte* raises new issues). The Fifth Circuit recognizes waiver by implication as well as explicit waiver in habeas cases. *See* McGee v. Estelle, 722 F.2d 1206, 1213 (5th Cir. 1984).

[108] *See* McGee v. Estelle, 722 F.2d 1206, 1210-11, 1214 (5th Cir. 1984); Thompson v. Wainwright, 714 F.2d 1495, 1505-06 (11th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 2180 (1984); *see also* Felder v. Estelle, 693 F.2d 549, 554 (5th Cir. 1982) (permitting state waiver because exhaustion is a matter of comity). *But see* Naranjo v. Ricketts, 696 F.2d 83, 86-87 (10th Cir. 1982) (state waiver not dispositive of exhaustion issue). The *McGee* and *Thompson* courts found indirect support for the state waiver doctrine from abstention cases such as Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471 (1977), in which the Court held that the waiver of the *Younger* abstention doctrine was permissible when the state voluntarily submits to a federal forum, *id.* at 479-80; *see McGee*, 722 F.2d at 1211; *Thompson*, 714 F.2d at 1503; *see also* Younger v. Harris, 401 U.S. 37, 53 (1971) (federal courts should abstain from enjoining pending state criminal proceedings absent extraordinary circumstances).

[109] Thompson v. Wainwright, 714 F.2d 1495, 1499-1500, 1504-05 (11th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 2180 (1984); Collins v. Lockhart, 707 F.2d 341, 344 (8th Cir. 1983) (en banc); *see* Rose v. Lundy, 455 U.S. 509, 526 (1982) (Blackmun, J., concurring). The goals of *Lundy*—comity, maximization of judicial resources, and prevention of delay—are fostered by continuance. *Thompson*, 714 F.2d at 1499. Furthermore, continuance is not explicitly precluded by *Lundy*. *Id.*

[110] *See supra* notes 104-109 and accompanying text.

[111] *See, e.g.*, Hall v. Iowa, 705 F.2d 286-87 (8th Cir.) (*Lundy* confined to federal claims; federal district court may hear mixed petition when unexhausted state claims present no issue of constitutional relevance), *cert. denied*, 104 S. Ct. 339 (1983); *cf.* Recent Decision, *supra* note 97, at 328 (durability of *Lundy* is questionable since decision was based on inaccurate statutory interpretation). Precedent does not require adherence to the total exhaustion requirement. *Lundy*, 455 U.S. at 523-24 (Blackmun, J., concurring); *see, e.g.*, Gooding v. Wilson, 405 U.S. 518, 519-20 (1972) (Court reviewed exhausted claim despite mixed petition); Picard v. O'Connor, 404 U.S. 270, 275 (1971) (exhaustion requirement satisfied if claim has been fully and fairly presented to state court).

[112] *See supra* note 101 and accompanying text.

effort to devise procedural barriers that discourage pro se petitioners from litigating their habeas claims, the Supreme Court risks damaging federal-state comity and wasting judicial resources.[113] A district court judge should be able to dismiss a futile or frivolous unexhausted claim in the interest of judicial economy, and, more importantly, should be able to provide the petitioner with speedy relief under the habeas corpus statute.[114] When a mixed petition contains meritorious unexhausted claims interwoven with exhausted claims, continuance provides both ample deference to state courts and a federal forum in which all the habeas petitioner's constitutional claims may be consolidated.[115] Furthermore, it is submitted that continuance circumscribes the possibility of an abuse of the writ sanction by preserving the original habeas petition.[116]

SYNTHESIS OF THE SUPREME COURT'S JURISDICTIONAL POSTURE

The federal interest theory of jurisdiction recognizes a broad power in Congress, under article III, to create federal jurisdiction whenever a potential federal issue exists.[117] To preserve federal ju-

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[113] *See* Matlock v. Rose, 731 F.2d 1236, 1240 (6th Cir. 1984); Yackle, *supra* note 97, at 435.

[114] *See* Matlock v. Rose, 731 F.2d 1236, 1240 (6th Cir. 1984) (futility doctrine furthers federal judicial economy); Recent Decision, *supra* note 97, at 327 (discretion promotes judicial economy by avoiding summary review of all petitions for unexhausted claims); *cf.* Fay v. Noia, 372 U.S. 391, 426 (1963) (discretion provides flexibility to avoid illogical jurisdictional bars); Thompson v. Wainwright, 714 F.2d 1495, 1505-06 (11th Cir. 1983) (en banc) (waiver fosters comity and finality), *cert. denied*, 104 S. Ct. 2180 (1984).

[115] *See* Thompson v. Wainwright, 714 F.2d 1495, 1499 (11th Cir. 1983) (en banc) (continuance permits all of petitioner's claims to be heard at once), *cert. denied*, 104 S. Ct. 2180 (1984); Collins v. Lockhart, 707 F.2d 341, 344 (8th Cir. 1983) (case held in abeyance, as a matter of comity, so that state court could litigate unexhausted claim); M. REDISH, *supra* note 6, at 219 (continuance does not disturb state court judgment).

[116] *See supra* notes 97-100 and accompanying text.

[117] *See* M. REDISH, *supra* note 6, at 56; *see also* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224 (1948) (Congress' greater power to legislate includes lesser power to confer federal jurisdiction). The federal interest theory derives from Chief Justice Marshall's opinion in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); *see* M. REDISH, *supra* note 6, at 54-57; C. WRIGHT, *supra* note 44, § 20, at 111. An expansive interpretation of *Osborn* recognizes a potential for federal jurisdiction over any case involving even a remote federal issue, provided that Congress enacts a jurisdictional statute. *See* M. REDISH, *supra* note 6, at 56. *But cf.* Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 187-88 (1953) (limiting *Osborn* to those cases involving pre-existing federal interests or instrumentalities). Even those who object to jurisdiction based on the expansive interpretation have recognized that such an interpretation is valid. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting); T.B. Harms Co. v. Eliscu, 339 F.2d 823, 825 (2d Cir.

dicial resources for those cases involving significant federal interests and to promote comity, the federal courts have maintained a policy of judicial restraint with regard to some types of cases that technically are within the realm of federal jurisdiction, but do not present an important federal question.[118] When Congress specifically has recognized a significant federal interest and has authorized federal jurisdiction, discretionary policies of judicial restraint and comity are overridden.[119]

The habeas corpus statute, by offering fresh factfinding in a federal district court in addition to ordinary appellate review, demonstrates a recognition by Congress that the availability of a federal remedial process above and beyond certiorari review will help protect the important federal interest of redressing the unconstitutional incarceration of state prisoners.[120] Conversely, the adequate and independent state ground doctrine, as traditionally applied,

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1964), *cert. denied*, 381 U.S. 915 (1965).

[118] *See, e.g.*, Younger v. Harris, 401 U.S. 37, 53 (1971) (no federal injunctions against state criminal prosecutions absent extraordinary circumstances); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500-01 (1941) (federal courts to recognize state independence by exercising discretion in asserting jurisdiction); *cf.* M. REDISH, *supra* note 6, at 216-17 (the adequate and independent state ground doctrine prevents advisory opinions and fosters comity).

[119] *See* Mishkin, *supra* note 117, at 192 ("where there is an articulated and active federal policy regulating a field," article III permits broad federal jurisdiction); *cf.* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-16 (1964) (noting importance of federal jurisdiction when statute provides for fresh factfinding); H.J. FRIENDLY, *supra* note 28, at 95 (strength of federal interest is an important determinant regarding whether federal courts should abstain). If federal law creates a duty and a remedy, federal jurisdiction usually will be found. *See* C. WRIGHT, *supra* note 44, § 17, at 95. Even when a federal statute provides a duty without a remedy, a private cause of action may be implied in a federal forum. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18-19 (1979) (right of action in federal court may be implied from Congressional intent even though face of statute authorizes no remedy); *see also* Cannon v. University of Chicago, 441 U.S. 677, 703 (1979) (Court will imply cause of action when remedy would accomplish underlying purpose of statute). The Court's ability to imply remedies derives from Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 824 (1824) (when there is a right, a remedy must be available).

[120] *See* Fay v. Noia, 372 U.S. 391, 415-16 & n.27 (1963) (Congress clearly intended method of federal review in addition to appellate process); 28 U.S.C. § 2254 (1982); *cf.* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964) (appellate/certiorari review is "inadequate substitute for the initial District Court determination"). Even Justice Frankfurter, whose opinions usually reflected a desire to define federal jurisdiction narrowly, *see* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 474-75 (1957) (Frankfurter, J., dissenting); Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500-01 (1941), acknowledged and steadfastly supported broad federal collateral review in the area of habeas corpus, *see* Brown v. Allen, 344 U.S. 443, 508 (1953). *See generally* Peller, *supra* note 45, at 583-85 & n.24 (discussion of broad scope of collateral review under *Brown v. Allen*).

demonstrated a recognition by the Court that when a state court renders a decision on the basis of both the state and federal constitutions, and Congress has not expressly conferred federal jurisdiction, the federal interest involved is correspondingly weak.[121] Thus, the Supreme Court has deferred to state court resolution of questions of state law tangentially involving inchoate federal constitutional issues.[122] The Burger Court, however, has extended the federal interest doctrine past its outermost limit[123] by reviewing state cases that involve only a potential misconstruction of federal law.[124] Therefore, by constricting habeas relief while expanding appellate review over ambiguously grounded state cases,[125] the Burger Court has refused to recognize a strong federal interest expressly stated by Congress, while creating jurisdiction when Congress has been silent and the federal interests involved are weak.[126]

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[121] *See supra* notes 15-17 and accompanying text.

[122] *See* C. WRIGHT, *supra* note 44, § 7, at 22; *cf.* Michigan v. Long, 103 S. Ct. 3469, 3490 (1983) (Stevens, J., dissenting) (sound management of scarce judicial resources counsels policy of judicial restraint); H.J. FRIENDLY, *supra* note 28, at 93 (federal court should abstain from interpreting state statutes that have not yet been construed by state courts).

[123] Even the most expansive interpretations of *Osborn* recognize that Congress must act pursuant to article III to establish jurisdiction over potential federal questions. *See* M. REDISH, *supra* note 6, at 55-56; *cf.* Note, *The Outer Limits of "Arising Under,"* 54 N.Y.U. L. REV. 978, 986 n.5 (1979) (*Osborn* rejects power in excess of jurisdiction).

[124] *See* Michigan v. Long, 103 S. Ct. 3469, 3476 (1983). Through the holding in *Long*, the Supreme Court authorized itself to accept appellate jurisdiction over state cases whenever the state court has not clearly indicated that its opinion was based on state law. *Id.* This elusive jurisdictional posture permits the Court to hear state cases even when no federal right has been denied. *See id.* at 3490 (Stevens, J., dissenting). The Court, almost exclusively, has invoked the *Long* presumption of jurisdiction when the state court has safeguarded an individual more protectively than the federal Constitution would require. *See* Florida v. Meyers, 104 S. Ct. 1852, 1855 (1984); *cf.* L. BAUM, THE SUPREME COURT 90 (1981) (screening process by Burger Court in criminal cases reflects pattern of accepting cases primarily brought by prosecutors).

[125] *See* Comment, *supra* note 13, at 1099 (Supreme Court has reduced access to lower courts while increasing oversight of state supreme courts).

[126] *Compare* Michigan v. Long, 103 S. Ct. 3469, 3474 (1983) (claim of state heard on the merits although there was no denial of federal constitutional right) *with* Engle v. Isaac, 456 U.S. 107, 110 (1982) (plenary review of unconstitutional imprisonment denied due to procedural default) *and* Rose v. Lundy, 455 U.S. 509, 510 (1982) (procedural default precludes review). The federal interest doctrine mandates broad access to a federal forum in the area of habeas corpus because significant federal interests are at stake. *See supra* notes 117-119 and accompanying text. The doctrine is violated when the Supreme Court assumes jurisdiction of state cases in which there is only a possibility of a misconstruction of federal law and clarification from the state court is warranted. *See supra* notes 121-122 and accompanying text. Furthermore, every state case brought to a federal court under the habeas corpus statute asserts a violation of federal law. *See* 28 U.S.C. § 2254(a) (1982) (petition must contend

A common ground for the creation of federal jurisdiction is the fear that states will not provide a neutral forum that adequately protects the rights of litigants.[127] A constitutional example of such "protective jurisdiction" is the provision for diversity jurisdiction in article III.[128] The same protective theory also underlies both the habeas corpus statute[129] and the appellate jurisdiction statute under which cases involving adequate and independent state grounds may be reviewed.[130]

The 1867 amendments to the habeas corpus laws reflect a congressional concern that state court judges would not adequately protect the federal constitutional rights of state prisoners and criminal defendants.[131] The Burger Court, however, by creating excessive procedural barriers that reduce the availability of habeas

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that petitioner in custody in violation of Constitution or laws of the United States). However, ambiguously grounded state cases before the Supreme Court on petition for certiorari may not allege any infringement of the United States Constitution. *See* Michigan v. Long, 103 S. Ct. 3469, 3490 (1983) (Stevens, J., dissenting). The *Long* doctrine enables state prosecutors to argue that the state court has "over protected" a citizen. *See id.* (Stevens J., dissenting) This result is anomalous since the appellate jurisdiction statute is designed, in part, to protect state citizens from the possibility that state courts will not adequately guard their federal rights. *See supra* note 122 and accompanying text.

[127] *See* M. REDISH, *supra* note 6, at 59 & n.47. Congress has in certain instances granted the federal courts jurisdiction over state matters when a significant federal interest is involved. *See* C. WRIGHT, *supra* note 44, § 20, at 111. The concept of "protective jurisdiction" is an offspring of the *Osborn* federal interest theory. *See id.* at 111. The development of the "protective jurisdiction" theory may be attributed to two scholars, Professors Mishkin and Wechsler, with divergent views concerning the scope of the doctrine. *See* M. REDISH, *supra* note 6, at 59. *Compare* Mishkin, *supra* note 117, at 192 (Congress can grant federal jurisdiction over state law whenever there is an "articulated and active federal policy regulating a field") *with* Wechsler, *supra* note 117, at 224-25 (Congress can grant litigants a federal forum whenever Congress has the power to regulate substantively in a given area).

[128] *See* U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. § 1332 (1982); *see also* C. WRIGHT, *supra* note 44, § 23, at 128 (diversity jurisdiction based on fear that state courts would prejudice out-of-state litigants).

[129] *See* Fay v. Noia, 372 U.S. 391, 415-17 (1963). Since a habeas petitioner must assert a violation of federal statutory or constitutional law, *see* 28 U.S.C. § 2254 (1982), he could conceivably petition for Supreme Court appellate or certiorari review, *see* 28 U.S.C. § 1257(3) (1982). Nevertheless, the habeas statute guarantees a federal forum while the appellate statute provides only a possibility that the Supreme Court will review. *Cf.* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415-16 (1964) (noting importance of securing federal forum).

[130] *See* 28 U.S.C. § 1257 (1982).

[131] *See, e.g.*, Mitchum v. Foster, 407 U.S. 225, 238-39 (1972) (§ 1983 enacted to protect against state abuses); Fay v. Noia, 372 U.S. 391, 415-16 (1963) (habeas coverage extended to state prisoners to guard against possible unfair state proceedings). *See generally* M. REDISH, *supra* note 6, at 116-18 (post-civil war statutes illustrative of federal mistrust of willingness of states to protect federal rights). *But cf.* Sheran, *supra* note 29, at 792 (effectiveness of state court judges is increasing).

review, has subverted the intent of Congress and has relied on untenured state court judges to monitor state criminal proceedings and executive activity for federal constitutional violations.[132] Similarly, in enacting section 1257 of the Judiciary Code, Congress intended to permit Supreme Court appellate review of state decisions only when the state clearly impinged on some recognizable federally created right.[133] *Michigan v. Long* and its progeny, however, authorize a discretionary posture that permits review of state cases whether or not a federal right has been denied.[134] If the Supreme Court accepts for review a case that does not involve the denial of a federal right, federal protective jurisdiction is being exercised when such protection is unnecessary.[135] Thus, the Court is risking unauthorized interference into state constitutional lawmaking.[136]

The Burger Court repeatedly has stressed the importance of comity, finality of decisions, and the maximization of judicial resources.[137] Yet, in both the areas of habeas corpus and adequate

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[132] *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1127-31 (1977). Federal judges, because of their life tenure and salary security, are excellent protectors of federal constitutional rights. *See* Bator, *supra* note 3, at 623; Neuborne, *supra*, at 1127-30. Conversely, state court judges, subject to partisan pressures, are less likely to protect individual rights. *See* Bator, *supra* note 3, at 623.

[133] *See supra* notes 38 and 126. To establish appellate jurisdiction in the Supreme Court, a state petitioner must satisfy one of the qualifications of 28 U.S.C. § 1257 (1982). When a federal right is denied, a state petitioner can appeal to the Supreme Court if a federal treaty, statute, or constitutional provision has been explicitly invalidated. *See* 28 U.S.C. § 1257 (1)-(2) (1982). Additionally, a state claimant may petition for a writ of certiorari when any right is "specially set up or claimed under the Constitution. . . ." *Id.* § 1257(3). Thus, Congress has not only refused to authorize appellate jurisdiction for potential federal questions, but also has specifically limited appellate jurisdiction to recognizable federal issues. *See* C. WRIGHT, *supra* note 44, § 107, at 743 (federal question necessary to invoke Supreme Court jurisdiction under § 1257).

[134] *See supra* notes 21-22 and accompanying text.

[135] *See* Comment, *supra* note 13, at 1101.

[136] *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498 (1977); Kelman, *supra* note 25, at 414; Wilkes, *supra* note 25, at 433-34.

[137] *See* Michigan v. Long, 103 S. Ct. 3469, 3475-76 (1983); Rose v. Lundy, 455 U.S. 509, 518-19 (1982); Comment, *supra* note 86, at 203. Justice Powell suggested that expansive habeas corpus relief is antithetical to the following values:

> (i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.

Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring); *see* Comment, *supra* note 86, at 172; *see also* Engle v. Isaac, 456 U.S. 107, 127-28 (1982) (discussion of the costs to society and federalism due to writ of habeas corpus).

and independent state grounds, the Burger Court's jurisdictional mandates portend the diminution of these goals.[138] The *Long* policy of permitting review on the merits, even though an adequate and independent state ground may exist, engenders a waste of judicial resources because of the high risk of advisory opinions,[139] harms federal-state comity through intrusion into state constitutional lawmaking,[140] and prevents finality, since the state court, on remand, must review the case on the merits for the second time.[141] In the habeas corpus arena, the *Lundy* total exhaustion rule hinders comity and wastes state judicial resources by requiring the exhaustion of even frivolous state claims and prevents finality when unexhausted claims are returned to the state courts only to be taken back through the federal system at a later date.[142] In addition, since an attorney's failure to assert a plausible claim does not satisfy the "cause" arm of the *Sykes* "cause and prejudice" standard, attorneys will advance every possible constitutional claim,

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[138] *See infra* notes 139-144 and accompanying text.

[139] *See* Comment, *supra* note 13, at 1095; *supra* note 26 and accompanying text.

[140] *See* Michigan v. Long, 103 S. Ct. 3469, 3492 (1983) (Stevens, J., dissenting); Comment, *supra* note 13, at 1096.

[141] *See, e.g.*, State v. Neville, 346 N.W.2d 425, 426 (S.D. 1984) (Court reversed and remanded case to state court); *see* Comment, *supra* note 13, at 1093; *cf.* H.J. FRIENDLY, *supra* note 28, at 93 (federal court should abstain from interpreting unclear state law because subsequent, conflicting construction by state courts will render federal decision "futile and unnecessary").

[142] *See* Rose v. Lundy, 455 U.S. 509, 524-25 (1982) (Blackmun, J., concurring) ("total exhaustion" rule may cause unnecessary adjudications by state and federal courts); Casenote, *supra* note 94, at 1356 ("total exhaustion" rule will increase burden on federal judges); *see also* McGee v. Estelle, 722 F.2d 1206, 1210-11 (5th Cir. 1984) (comity is undermined when state court must endure expense and delay of reviewing unexhausted state claim that must ultimately be decided in federal forum); Thompson v. Wainwright, 714 F.2d 1495, 1505-06 (11th Cir. 1983) (en banc) ("total exhaustion" rule could delay finality), *cert. denied*, 104 S. Ct. 2810 (1984); Yackle, *supra* note 97, at 435 (if ignorant habeas claimant made aware of his options, he may return to state court to exhaust claims and then petition for habeas relief again in federal court).

The ever increasing number of federal cases has been a constant concern of the Supreme Court. *See* J. GROSSMAN & R. WELLS, CONSTITUTIONAL LAW & JUDICIAL POLICY MAKING 212 (2d ed. 1980); Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1203 & n.74 (1977). However, the impact of habeas petitions on the docket has been exaggerated because the size of the federal judiciary has grown and the percentage of time that federal judges spend on habeas corpus petitions is minimal. Comment, *supra* note 46, at 1632-33; *see* ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1983) (In 1983, 241,842 cases were filed in the federal district courts, but only 8,532 were habeas petitions by state prisoners); *see also* 28 U.S.C. §§ 631-639 (1982) (delegating some district court functions to magistrates). More importantly, cutting back on constitutional guarantees to preserve judicial resources is a "dangerous tool" for relieving overloaded dockets. *See* Brennan, *supra* note 136, at 498.

thereby impinging on state judicial resources and impairing comity and finality by burdening state courts with excessive, possibly meritless federal constitutional claims.[143] Thus, the Burger Court's attempts to achieve the goals of comity, finality, and judicial economy through decisions in the areas of habeas corpus and ambiguously grounded state cases have not only resulted in virtual judicial amendments to the congressional statutes conferring jurisdiction in these areas, but actually have undercut the policies the Court purports to promote.[144]

CONCLUSION

It is submitted that recent Supreme Court jurisdictional decisions in the areas of habeas corpus and adequate and independent state grounds have failed to maximize federal judicial power, and may adversely affect the legitimacy of the Court as an institution. To counteract the immediate and long-term ill effects of these recent pronouncements, this Note has advocated that the *Long* doctrine be replaced by a balancing of state and federal interests that will reduce the opportunities for the Court to infringe on state constitutional lawmaking in the guise of correcting misapprehensions of federal law. In addition, the Note has proposed the abolition of the *Sykes* "cause and prejudice" standard and the reinstatement of the *Fay v. Noia* "deliberate bypass" test, coupled in certain circumstances with a showing of fundamental unfairness. Finally, this Note has suggested that post-*Lundy* decisions by lower federal courts demonstrate the unworkability of the "total exhaustion" rule, and has recommended that these lower courts be re-endowed with the discretion to determine compliance with the exhaustion requirement in deciding whether to review mixed habeas petitions.

Tonianne Florentino

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[143] *See supra* notes 82-83 and accompanying text. Considerations of finality should not undermine the goal of vindicating an individual who has been unjustly imprisoned. *See* Reed v. Ross, 104 S. Ct. 2901, 2910 (1984); Fay v. Noia, 372 U.S. 391, 424 (1963); Comment, *supra* note 46, at 1634. Since only a minimal percentage of state convicts petition for habeas corpus, and the actual percentage who actually attain relief is even less, the importance of finality has been exaggerated. *See* Comment, *supra* note 46, at 1633.

[144] *See* Stone v. Powell, 428 U.S. 465, 503-06 (1976) (Brennan, J., dissenting); Comment, *supra* note 86, at 204. Nothing in Article III grants the Supreme Court the power to legislate. *See* U.S. CONST. art. III. Congress alone was vested with the lawmaking powers of the government and has the sole authority to amend its own laws. U.S. CONST. art. I, § 1; *cf.* Saltzburg, *supra* note 52, at 368 (Congress should determine policy objectives in habeas area).